

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN KOZLOWSKI and
MICHELLE KOZLOWSKI,
Plaintiffs,

v.

STATE OF NEVADA, et. al.,
Defendants.

3:14-cv-00218-MMD-WGC
ORDER

Before the court is Plaintiffs' application to proceed in forma pauperis (Doc. # 1)¹ and pro se complaint (Doc. # 1-1).

I. APPLICATION TO PROCEED IN FORMA PAUPERIS

A person may be granted permission to proceed in forma pauperis if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915; *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en

¹ Refers to court's docket number. The court acknowledges Plaintiffs' request that documents related to this case be in Arial 16 point font and double-spaced as a result of Mr. Kozolowski's impaired vision. With the exception of the single-spacing of this footnote, this document comports with that request.

1 banc) (stating that this provision applies to all actions filed in
2 forma pauperis, not just prisoner actions).

3 In addition, the Local Rules of Practice for the District of
4 Nevada provide: "Any person, who is unable to prepay the fees in
5 a civil case, may apply to the Court for authority to proceed *in*
6 *forma pauperis*. The application shall be made on the form
7 provided by the Court and shall include a financial affidavit
8 disclosing the applicant's income, assets, expenses, and
9 liabilities." LSR 1-1.

10 "[T]he supporting affidavits [must] state the facts as to [the]
11 affiant's poverty with some particularity, definiteness and
12 certainty.'" *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
13 (quoting *Jefferson v. United States*, 277 F.2d 823, 725 (9th Cir.
14 1960)). A litigant need not "be absolutely destitute to enjoy the
15 benefits of the statute." *Adkins v. E.I. Du Pont De Nemours & Co.*,
16 335 U.S. 331, 339 (1948).

17 Plaintiffs indicate that their monthly income is \$1,998, which
18 comes in the form of Social Security Disability Insurance (SSDI)
19 payments. (Doc. # 1 at 1.) Their monthly expenses roughly equal
20 their monthly income. (*Id.* at 2.) It appears they cannot pay the
21 filing fee; therefore, the application to proceed in forma pauperis
22 is granted.

23 **II. SCREENING**

24 28 U.S.C. § 1915 provides: "the court shall dismiss the case
25 at any time if the court determines that...the action or appeal (i) is
26 frivolous or malicious; (ii) fails to state a claim upon which relief
27 may be granted; or (iii) seeks monetary relief against a defendant
28 who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii).

1 This provision applies to all actions filed in forma pauperis,
2 whether or not the plaintiff is incarcerated. See *Lopez v. Smith*,
3 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc); see also *Calhoun*
4 *v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

5 Dismissal of a complaint for failure to state a claim upon
6 which relief may be granted is provided for in Federal Rule of Civil
7 Procedure 12(b)(6), and this court applies the same standard
8 under Section 1915(e)(2)(B) when reviewing the adequacy of the
9 complaint or amended complaint. See *Resnick v. Hayes*, 213
10 F.3d 443, 447 (9th Cir. 2000) (citation omitted). Review under
11 12(b)(6) is essentially a ruling on a question of law. See *Chappel*
12 *v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000).

13 In reviewing the complaint under this standard, the court
14 must accept as true the allegations of the complaint, *Hosp. Bldg.*
15 *Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976), construe
16 the pleadings in the light most favorable to plaintiff, and resolve all
17 doubts in the plaintiff's favor, *Jenkins v. McKeithen*, 395 U.S. 411,
18 421 (1969). Allegations in pro se complaints are held to less
19 stringent standards than formal pleadings drafted by lawyers, and
20 must be liberally construed. See *Hughes v. Rowe*, 449 U.S. 5, 9
21 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per*
22 *curiam*); *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011).

23 A complaint must contain more than a "formulaic recitation of
24 the elements of a cause of action," it must contain factual
25 allegations sufficient to "raise a right to relief above the
26 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
27 555 (2007). "The pleading must contain something more...than...a
28 statement of facts that merely creates a suspicion [of] a legally

1 cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller,
2 Federal Practice and Procedure § 1216, at 235-36 (3d ed.
3 2004)). At a minimum, a plaintiff should state "enough facts to
4 state a claim to relief that is plausible on its face." *Id.* at 570; see
5 also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

6 A dismissal should not be without leave to amend unless it is
7 clear from the face of the complaint that the action is frivolous and
8 could not be amended to state a federal claim, or the district court
9 lacks subject matter jurisdiction over the action. See *Cato v.*
10 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (dismissed as
11 frivolous); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

12 In their complaint, Plaintiffs name thirty four defendants who
13 allegedly denied their rights under the Americans with Disabilities
14 Act (ADA), 42 U.S.C. § 12101, *et. seq.* (Doc. # 1-1.) The
15 complaint makes reference to an incident that occurred on August
16 22, 2009, with respect to Mr. Kozlowski (Doc. # 1-1 at 5), and
17 then states that during the same time Ms. Kozlowski's rights
18 under the ADA were violated (*id.*). Plaintiffs go on to provide a
19 demand with various forms of requested relief. (*Id.* at 5-.) There
20 are no *factual* allegations that describe or otherwise inform the
21 defendants how Plaintiffs' rights under the ADA were violated. Nor
22 is it clear whether Plaintiff is bringing this action Title I of the ADA
23 (prohibiting employment discrimination on the basis of disability)
24 or Title II of the ADA (prohibiting discrimination against those with
25 disabilities in the provision of services, programs and activities
26 provided by a public entity).

27 If Plaintiffs seek to state a claim under Title I of the ADA,
28 they must allege facts showing that: (1) they are disabled within

1 the meaning of the ADA; (2) they are "qualified individuals"
2 capable of performing the essential functions of the job at issue,
3 with or without reasonable accommodation; and (3) were
4 unlawfully discriminated against because of their disability. *Smith*
5 *v. Clark County School Dist.*, 727 F.3d 950, 955 (9th Cir. 2013)
6 (citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th
7 Cir. 1999)).

8 If Plaintiffs seek to state a claim under Title II of the ADA,
9 they must allege facts showing that they are qualified individuals
10 with disabilities as the term is defined under the ADA and were
11 denied the benefits of the services, programs, or activities or
12 subject to discrimination by a public entity (which includes any
13 State or local government, department, agency, special purpose
14 district or other instrumentality of a State or States or local
15 government). See 42 U.S.C. §§ 12131, 12132.

16 Plaintiffs must include *facts* and not simply legal conclusions
17 demonstrating "a claim to relief that is plausible on its face."
18 *Twombly*, 550 U.S. at 570. In addition, facts must be included with
19 respect to *each* of the Plaintiffs' claims that their rights were
20 violated under the ADA.

21 In light of these noted deficiencies, Plaintiffs' complaint (Doc.
22 # 1-1) is dismissed without prejudice.

23 **III. CONCLUSION**

24 (1) Plaintiffs' application to proceed in forma pauperis
25 (Doc. # 1) is **GRANTED**. The Plaintiffs are permitted to maintain
26 this action to conclusion without the necessity of prepayment of
27 fees or costs or the giving of security therefor. This order granting
28 in forma pauperis status does not extend to the issuance of

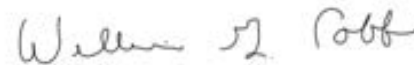
1 subpoenas at government expense.

2 (2) The Clerk is instructed to **FILE** the complaint (Doc.
3 # 1-1); however, the complaint is **DISMISSED WITHOUT**
4 **PREJUDICE**.

5 (3) Plaintiffs have **THIRTY DAYS** from the date of this Order
6 to file an amended complaint remedying, if possible, the
7 deficiencies noted in this Order. Plaintiffs are advised that
8 pursuant to Local Rule 15-1, if they choose to file an amended
9 complaint, it shall be complete in itself without reference to any
10 previous complaint. Plaintiffs shall clearly file the amended
11 complaint as such by placing the words "AMENDED
12 COMPLAINT" on page 1 in the caption, and shall place the case
13 number above the words "AMENDED COMPLAINT." Any
14 allegations, parties, or requests for relief from prior papers that
15 are not carried forward in the amended complaint will no longer
16 be before the court. Plaintiffs are cautioned that if they fail to file
17 an amended complaint within the time period specified above, the
18 action may be dismissed.

19
20 **IT IS SO ORDERED.**

21 Dated: May 14, 2014.

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25 _____
26 WILLIAM G. COBB
27 U.S. MAGISTRATE JUDGE
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